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In the Supreme Court of the United States

OCTOBER TERM, 1979

VICTOR DIVIVO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks review of the decision below enforcing an Internal Revenue summons issued to the Equitable Trust Company as part of an investigation of the tax liabilities of petitioner's business associate, Angelo DiBiasi. The summons sought bank records with respect to the entity "Angelo DiBiasi and Victor DeVivo, T/A Italian Delight Restaurant at 115-117 E. Baltimore Street." Although DiBiasi did not oppose Equitable's compliance with the summons, petitioner instructed Equitable not to comply, pursuant to his right as a person entitled to notice under 26 U.S.C. 7609(b)(2). The government thereupon brought this summons enforcement proceeding in the United States District Court for the District of Maryland, which enforced the summons on the ground that petitioner lacked standing to challenge

the summons (Pet. App. 49a). The court of appeals affirmed on the ground that petitioner had not alleged any facts to show that enforcement of the summons would constitute an abuse of process (Pet. App. 45a-74a).

The pertinent facts are undisputed and may be summarized as follows. In 1977, the Criminal Investigation Division of the Internal Revenue Service commenced an investigation of petitioner. In December 1977, special agents questioned DiBiasi and four others under oath. At that time, neither DiBiasi nor any of the others was informed that he was a target or potential target of any civil or criminal tax investigation. In April 1978, DiBiasi and the others questioned with him were notified that they were each the target of a tax investigation. On April 13, 1978, the special agent assigned to the DiVivo investigation telephoned the attorney who represented DiBiasi and one or more of the other persons. The agent suggested to the attorney that his clients cooperate with the Internal Revenue Service in the DiVivo investigation. During the conversation, the subject of immunity arose. The special agent stated that while his office could not grant immunity for a witness, immunity could be obtained in appropriate cases. The agent also suggested that because two of the clients were aliens, an ongoing tax investigation might adversely affect their opportunity to stay in the United States. Based upon this conversation with the special agent, DiBiasi's attorney believed that the Internal Revenue Service was attempting to pressure DiBiasi and his other clients into cooperating in the investigation of DiVivo (Pet. App. 46a-47a).

At the hearing held by the district court, Special Agent Donald Bell testified that he had been assigned to conduct the investigation of DiBiasi and had issued a summons to the Equitable Trust Company. On cross-examination, he

stated that he had accompanied, as a witness, the agent working on the DiVivo investigation when other persons had been questioned (Pet. App. 51a-52a). During petitioner's cross-examination of the agent, the district court asked petitioner's counsel to state his theory of challenging enforcement of the summons. After a "lengthy presentation," petitioner's counsel stated that the IRS was not involved in a full-scale investigation of anyone other than DiVivo and was investigating the others "only insofar as they relate to Mr. DiVivo, and only insofar as they can make a case against Mr. DiVivo * * *" (Pet. App. 54a). After hearing a lengthy proffer from petitioner's counsel and considerable testimony from the special agent on direct and cross-examination, the district court stated "If I ruled without hearing any further evidence, I am going to rule for the Government without any question" (Pet. App. 54a). However, the court ordered enforcement on the ground that petitioner lacked standing to challenge the summons (Pet. App. 49a, 54a). The court of appeals affirmed on the ground that petitioner had not alleged any facts that showed that enforcement of the summons would constitute an abuse of process (Pet. App. 45a-74a).[1]

1. The court of appeals correctly held that the summons at issue was enforceable. Petitioner contends (Pet. 15-23) that the facts alleged by him would, if true, amount to bad faith by the Internal Revenue Service and thereby render the summons unenforceable. Specifically, he argues that he was entitled to a full evidentiary hearing on the issue. But as the court of appeals correctly pointed

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[1]Contrary to the district court, the court of appeals ruled that petitioner had standing to raise his claim of abuse of process (see Pet. App. 63a). We do not disagree with that conclusion.

out (Pet. App. 63a-65a) the facts that petitioner alleged did not make out a prima facie case of bad faith that justified a further evidentiary hearing.[2] At best they indicated that the special agent investigating petitioner—not the agent who issued the summons at issue (Pet. App. 48a)—intended to explore the possibility of compromising any case against DiBiasi in return for DiBiasi's cooperation in the investigation of petitioner (Pet. App. 52a, 64a, 66a).[3] Those facts, however, do not render the summons in the DiBiasi investigation unenforceable. As the court of appeals properly observed, "[a]t no time has

[2]In assessing the need for a further evidentiary hearing, the court of appeals noted (Pet. App. 65a; 44 A.F.T.R. 2d para. 79-5250, at 79-5802.

> In this case the record discloses close cooperation between counsel for DiVivo, on the one hand, and counsel for DiBiasi and certain of the other partners and associates of DiVivo, on the other hand. There is every reason to believe that if there were no basis for the civil tax investigations of DiBiasi and the others, counsel for DiVivo as well as counsel for DiBiasi would know the same and that DiVivo would have presented specifics as to the same in one or more documents pursuant to Federal Civil Rule 56 and/or have informed the District Court of the same during DiVivo's counsel['s] presentation of DiVivo's "theory" of this case. There is thus, no need, in this case, to remand for further presentation and consideration of further evidence to and by the District Court in order to afford the opportunity to DiVivo to prove abuse of the process of the District Court by the enforcement of the summons in the civil tax investigation of DiBiasi. DiVivo has had that opportunity and has fallen short of alleging or proffering facts or theory entitling him to any further evidentiary hearing or to any of the relief he seeks.

[3]The Internal Revenue Service has the statutory power to compromise civil or criminal cases. Under Section 7122 of the 1954 Code, the Secretary of the Treasury, or his delegate, is authorized to "compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense * * *." See *United States* v. *Barrett*, 505 F. 2d 1091, 1101-1102 (7th Cir. 1974), cert. denied, 421 U.S. 964 (1975).

[petitioner] suggested, except once in a single isolated conclusory oral assertion by counsel, that the civil tax investigations of DiBiasi and the others were themselves phony, *i.e.*, that there was no factual basis upon which the IRS could have conducted an investigation to determine whether DiBiasi and the others, as admitted partners and associates of [petitioner], violated any of their respective civil tax duties * * *" (Pet. App. 64a). Thus, since petitioner did not allege facts that would "disprove the actual existence of a valid civil tax determination or collection purpose by the Service" (*United States* v. *LaSalle National Bank*, 437 U.S. 298, 316 (1978)), there was no basis for a further evidentiary hearing. See also *United States* v. *McGuirt*, 588 F. 2d 419, 421 (4th Cir. 1978), cert. denied, No. 78-1607 (Oct. 1, 1979); *United States* v. *Morgan Guaranty Trust Co.*, 572 F. 2d 36, 42 (2d Cir.), cert. denied, 439 U.S. 822 (1978); *United States* v. *Noall*, 587 F. 2d 123, 127 (2d Cir. 1978), cert. denied, 441 U.S. 923 (1979); *United States* v. *Chemical Bank*, 593 F. 2d 451, 458 (2d Cir. 1979); *United States* v. *Garden State National Bank*, 607 F. 2d 61, 70-71 (3d Cir. 1979).[4]

Finally, petitioner contends (Pet. 20-21) that the agent's discussion of compromise and immunity for those involved in the DiBiasi investigation violated several provisions of the Internal Revenue Manual. But even on the assumption that such a violation occurred, such

[4]Nor did petitioner allege any facts that would support a claim that the summons was issued for purposes of harassment or to put pressure on him to settle a collateral dispute. *United States* v. *Powell*, 379 U.S. 48, 58 (1964). In the absence of any allegation that the investigation of DiBiasi was without substance and was intended primarily to pressure DiBiasi to cooperate in petitioner's investigation, there was no basis for an inference of bad faith that would warrant a further hearing.

agency regulations are not mandated by the Constitution or statute. The agent's conduct therefore did not violate any of petitioner's rights or reflect upon the good faith of the other agent who issued the summons in the DiBiasi investigation. See *United States* v. *Caceres*, 440 U.S. 741 (1979); *United States* v. *Nuth*, 605 F. 2d 229 (6th Cir. 1979). Accordingly, the decision below properly enforced the summons in the DiBiasi investigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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